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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 676

MARK K. FRANK,

Petitioner,

v.

LEON HENDERSON, Price Administrator,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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Petition for Writ of Certiorari.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of M. K. Frank, your petitioner, respectfully pray for a writ of certiorari to the United States Emergency Court of Appeals to review the determination of that Court entered in the above case on December 29th, 1942 dismissing the complaint of your petitioner made in protest against Revised Price Schedule No. 46 issued pursuant to Section 206 of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77th Cong., 2d Sess.).

Statement.

The United States Emergency Court of Appeals rendered a per curiam opinion (pp. 52, 53, Rec.) dismissing the complaint because it failed to conform to the statutes governing protests under the said Act.

In August 1941 your petitioner was requested by the Office of Price Administration to supply certain information with respect to prices for the years 1937-1941 inclusive for relaying rail. On December 2nd, 1941 Price Schedule No. 46 was issued by the Office of the Price Administrator and after the passage of the Emergency Price Control Act of 1942 (January 30th, 1942) said Price Schedule No. 46 was reissued on February 11th, 1942 as Revised Price Schedule No. 46 effective as of the latter date under Section 206 of the Emergency Price Control Act of 1942.

Under Section 203(a) of the Emergency Price Control Act of 1942 one subject to any price schedule or regulation (your petitioner was and is subject to Revised Price Schedule No. 46) might, within sixty (60) days after its issuance, file a protest setting forth objections thereto. A certain document dated April 1st, 1942 (within sixty (60) days after issuance of Revised Price Schedule No. 46 on February 11th, 1942) which incorporates therein, by reference, matter contained in documents, Exhibit "B" (pp. 3-13 incl., Rec.), Exhibit "C" (pp. 14-29, incl., Rec.), Exhibit "D" (pp. 30-31, Rec.) and Exhibit "E" (pp. 32-36 incl., Rec.) was mailed to the Office of Price Administration by your petitioner's manager of the Pittsburgh Office (pp. 37, 38, 39, Rec.). No action was taken on said protest until action was instituted in the United States District Court for the Western District of Pennsylvania for production of the books and records of your petitioner. This action was the first intimation by the Office of Price Administration that the protest was rejected.

It is this document, Exhibit "F", with its references to other documents which your petitioner contends is a protest under the said Act and which protest should be determined on its merits.

Jurisdiction.

1. The jurisdiction of this Court rests on Section 204(d) of the Emergency Price Control Act of 1942.

2. The decision of the United States Emergency Court of Appeals was entered on December 29th, 1942 (pp. 52, 53, Rec.).

The Questions Presented.

The questions presented are:

(1) Whether Exhibit "F", a document dated April 1st, 1942 (pp. 37, 38, 39, Rec.) is a valid protest against Revised Price Schedule No. 46.

(2) Whether the United States Emergency Court of Appeals should have dismissed the complaint of your petitioner.

Reasons for Granting the Writ.

The Federal Rules of Civil Procedure Section 8(f) provide that "all pleadings should be construed as to do substantial justice". It may well be admitted that the protest filed by your petitioner does not conform *in all essentials* to the requirements of the procedural regulations issued pursuant to the said Act, but "to do substantial justice" the writ should be granted to determine this protest.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the decision of the United States Emergency Court of Appeals should be granted.

Dated, January 28th, 1943.

FRANK R. S. KAPLAN,
DAVID ROTH,
of Pittsburgh, Pa.

HERBERT M. KARP,
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Attorneys for Petitioner.

PETITIONER'S

BRIEF

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Emergency Court of Appeals is unreported.

Statement.

The relevant record facts and the facts with regard to the jurisdiction of this Court are both stated in the petition.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed are that the United States Emergency Court of Appeals erred

(1) In that it decided that the document, dated April 1st, 1942, Exhibit "F", (pp. 37, 38, 39, Rec.) filed with the Office of Price Administration was not a protest against Revised Price Schedule No. 46 under the Emergency Price Control Act of 1942.

(2) In that the United States Emergency Court of Appeals granted the motion to dismiss the complaint of your petitioner.

Summary of Argument.

The decision of the United States Emergency Court of Appeals dismissing the complaint does not do substantial justice.

Argument.

Although price control as a means of preventing inflation was the law of this Country before, the provisions of the Emergency Price Control Act of 1942, the procedural regulations issued pursuant thereto and the establishment of the United States Emergency Court of Appeals is, in some sense, novel. There is no issue with price control, as an instrument to accomplish the desired end,—as a fact, your petitioner believes in and favors price control in the present emergency. However, it is obvious that the filing of the protest by petitioner signifies a decided disagreement with the provisions of Revised Price Schedule No. 46.

It is not the purview of this brief to dwell on the provisions of Revised Price Schedule No. 46 except that it should be brought to this Court's attention that the said Price Schedule is confiscatory and arbitrary and in direct conflict to the reasons and theory propounded during the Congressional Hearings, both in the House of Representatives and the Senate, for the passage of the said Act.

The very basis of the protest of your petitioner is that Revised Price Schedule No. 46 does not conform to nor were the factors set forth in Section 2 of the Emergency Price Control Act of 1942 considered in establishing ceiling prices for relaying rail. This objection to the said price schedule is clearly stated in the protest (pp. 37, 38, 39, Rec.):

> "Therefore, not being the result of the sort of consideration of factors in the Act that were selected after painful and efficient study * * *"

which protest incorporates therein certain documents, to wit: Exhibit "B" (pp 3-13 incl., Rec.), Exhibit "C" (pp.

14-29 incl., Rec.), Exhibit "D" (pp. 30, 31, Rec.) and Exhibit "E" (pp. 32-36 incl., Rec.), all of which, taken as one document by incorporation, constitute a protest under the said Act.

Your petitioner respectfully urges that his protest is sufficient for the purpose of the granting of this writ of certiorari and that the said decision of the United States Emergency Court of Appeals should be reversed. The right of judicial review of the denial of a protest is, apparently, limited and the failure to secure this writ will deny to your petitioner his basic right to have determined by this Court whether the Office of Price Administration acted in accordance with the provisions of the said Act in promulgating a price schedule which has resulted in all but the extermination of a business essential to this Country in the present emergency.

The Office of Price Administration had actual notice of the contents of your petitioner's express objection to the said price schedule and their failure to act thereon would seem to be a denial of the privileges of a citizen of this Country. Therefore, it is respectfully submitted that the correct motion which should have been directed against the complaint was one for a more definite statement under Rule 12(e) F.R.C.P.

It is respectfully submitted that since this Court prescribed the Rules of Civil Procedure pursuant to the Act of June 19th, 1934, chapter 651 (48 Stat. 1064) that a writ of certiorari issue so that your petitioner may have the right to establish his protest. It is furthermore respectfully submitted to this Court that its discretion should be exercised in the instant case due to the effect, generally, of any price schedule upon the economy of the United States at this time.

CONCLUSION.

For the reasons heretofore assigned, it is respectfully submitted that this case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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